UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PIEPER ELECTRIC, INC. d/b/a
MAURER ELECTRIC [1]

and Case 30-CA-16913

EMBER M. SMOODY, AN INDIVIDUAL

Andrew S. Gollin, Esq., of Milwaukee, WI,
for the General Counsel.
Jonathan O. Levine, Esq., of Milwaukee, WI,
for the Respondent-Employer.

DECISION

Statement of the Case

Bruce D. Rosenstein, Administrative Law Judge. This case was tried before me on May 18, 2005, in Milwaukee, Wisconsin, pursuant to a Complaint and Notice of hearing (complaint) issued on August 31, 2004,[2] by the Acting Regional Director for Region 30 of the National Labor Relations Board (the Board). The underlying charge was filed on June 29, by Ember M. Smoody (the Charging Party or Smoody)[3], alleging that Maurer Electric and Pieper Electric, Inc. (the Respondent or Employer), has engaged in certain violations of Section 8(a) (1), (3) and (4) of the National Labor Relations Act. (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.[4]

Issues

The complaint alleges that the Respondent, in violation of Section 8(a)(1), (3), and (4) of the Act, refused to consider and/or hire the Charging Party because she assisted the International Brotherhood of Electrical Workers, Local 127, AFL-CIO (Union) or filed a charge and provided testimony to the Board in Case 30-CA-15617.

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[1] The correct name of the Respondent was amended at the hearing.

[2] All dates are in 2004 unless otherwise indicated.

[3] The Charging Party was known as Ember Bettack in 2001 and 2002. Effective in 2004, her last name now appears in the record as Smoody.

[4] The Respondent's affirmative defense to defer this matter to the applicable grievance-arbitration process is rejected. In this regard, the Board has held that issues involving Section 8(a)(4) are solely within its province to decide. Indeed, the Board has declined to defer to arbitration where, as here, the "alleged violations of Section 8(a)(1) and (3) of the Act are closely intertwined with the allegations involving Section 8(a)(4)." See, *Filmation Associates, Inc.,* 227 NLRB 1721 (1977).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent[5], I make the following

Findings of Fact

I. Jurisdiction

The Respondent is a corporation engaged as an electrical contractor in the construction industry in Kenosha, Wisconsin, where it annually purchased and received goods valued in excess of $50,000 directly from suppliers located outside the State of Wisconsin. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background and Facts

In May 1998, Smoody commenced employment in the construction industry as an apprentice in the Joint Apprenticeship and Training Program for the Electrical Industry. An apprentice must complete 8,000 hours of work in order to attain journeyman status. In June 2001, Smoody had completed approximately 60% of the Training Program.

On June 19, 2001, Smoody became sick and was sent home early because she was exposed to paint fumes. Upon returning home, she checked her mail to discern whether her paycheck had arrived from the Respondent. Smoody immediately telephoned Union Business Manager Edward Gray as she did not receive her paycheck.

On June 20, 2001, Smoody arrived at her assigned Carthage College worksite and asked a fellow employee whether he received his paycheck the preceding day. The employee confirmed receipt of his check and recommended that Smoody contact Foreman Gary Hetland to let him know that the check had not been received. Smoody contacted Hetland who promised to contact the Respondent if the check was not received once Smoody returned home that day.

Upon arriving home on June 20, 2001, and not receiving her paycheck, Smoody telephoned Gray who promised to contact the Respondent. At approximately 4:30 p.m. on that day, Smoody received a telephone call from one of Respondent's secretaries who promised to have her paycheck delivered to the jobsite on June 21, 2001.

On June 21, 2001, Smoody commenced work at her regular time but by 9:00 a.m. she still had not received her paycheck. Shortly thereafter, Hetland approached Smoody and

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[5] On July 6, 2005, Respondent filed a Petition for Leave to File Reply Brief. On the same date, the General Counsel responded and opposed the Petition for Leave to File Reply Brief. Since there is no provision in the Board's Rules for the filing of reply briefs and the matter rests in my discretion, I find that the post-hearing briefs submitted by the parties and the record as a whole are sufficient to make a decision in this case. Therefore, I deny the Respondent's Petition for Leave to File Reply Brief.

inquired how the shop knew that she had not received her paycheck. Smoody replied that she had called her Union Business Agent. Hetland stated with his finger pointed in Smoody's face that "you don't call the Business Agent for nothing because I'm running this job not him. It is none of his business what is going on here, you come to me first and if I don't do anything then you go to him."

Smoody, during her morning break, telephoned Gray and reported to him what Hetland had stated to her.

Hetland, later that day, handed Smoody three separate checks representing her pay for the prior week, 8 hours for having to wait several days for her paycheck and separation pay (GC Exh. 2). At that same time, Hetland informed Smoody that she was being laid off for lack of work.

Smoody immediately went to the Union Hall to inform Gray about her layoff.

By letter dated June 22, 2001, Gray filed a grievance against Respondent protesting Smoody's layoff as being in retaliation for her protests about the delay in receiving her paycheck (GC Exh. 3).

On or about June 27, 2001, Smoody learned that the Respondent stopped payment on check # 1183 (GC Exh. 2) regarding the excess waiting time for the receipt of her paycheck (GC Exh. 4).

By letter dated June 29, 2001, Gray filed a grievance against the Respondent protesting the stop payment order for the check (GC Exh. 5).

On July 31, 2001, Smoody filed an unfair labor practice charge in Case 30-CA-15617 alleging that her layoff on June 21, 2001, was discriminatory.

By letter dated August 1, 2001, the labor management committee sustained the Union's June 29, 2001, grievance and directed the Respondent to reimburse Smoody for all incurred damages and full reimbursement for the check amount (GC Exh. 14).

By letter dated August 8, 2001, the Respondent agreed to resolve the Union's grievance regarding Smoody's layoff and offered to reinstate her effective August 13, 2001. Because Smoody was on maternity leave, the parties agreed that she would be reinstated in November 2001.

On September 28, 2001, the General Counsel issued a complaint and notice of hearing in Case 30-CA-15617.

On August 6, 2002, the Regional Director approved a bilateral settlement agreement in Case 30-CA-15617 (GC Exh. 10), that made Smoody whole for any losses incurred because of her layoff and the case was closed on compliance in November 2002.

Smoody returned to work on or about November 13, 2001, and was assigned to the St. Catherine's Hospital job under the overall supervision of Project Foreman Michael LeMaster, who is also a union member.

Smoody testified that during the first several weeks on the jobsite, LeMaster apprised her that she was not completing the task of "bending pipe" in a timely manner. Smoody attributes this to a lack of training. Shortly after this conversation, Smoody was transferred to

the composite clean-up crew and remained in this assignment until approximately February 28, 2002. On that date, LeMaster removed Smoody from the clean-up crew due to written complaints that he had received from the General Contractor. Smoody denies that she created any distractions among the clean-up crew but does admit that she signed a memorandum to this effect in LeMaster's presence (GC Exh. 7).[6]

In April 2002, Smoody was assigned to the Ocean Spray project but along with other employees was laid off in May 2002. Neither the Union nor Smoody protested the layoff.

LeMaster testified that his overall impression of Smoody's work was that she was slower then other apprentices with less experience, and was not the type of employee that should be assigned to projects that required a quick turnaround. In his opinion, Smoody would slow other workers down. Indeed, Smoody admitted that LeMaster's counseled her about her lack of productivity and that she socialized too much.

In June 2004, Respondent commenced work on a major job that had to be completed in a three month period. The job required 10,000 man hours and in order to complete the project in the allotted time, it was necessary to run two shifts of workers.

Respondent's Project Manager Dan Wargolet used his core in-house electricians to initially staff this key project. When it became apparent that additional manpower was necessary, Wargolet telephoned the Union on June 22, and requested that four journeyman electricians and two apprentices with at least 90% of their training completed be referred. The request for experienced and productive apprentices was made based of the need to turn the job over in an expeditious manner.

On June 23, the Union secretary informed Wargolet of the names of the individuals the Union intended to refer to the project. Wargolet became concerned when he learned that one of the apprentices on the referral list was Smoody. In prior conversations with LeMaster, Wargolet learned that he had concerns with her overall job performance. Wargolet also recalled that Smoody had been removed from a work assignment based on the complaints of a General Contractor.

Wargolet telephoned Gray on June 23, and informed him that the Respondent may have a problem with Smoody's referral based on prior concerns with her work ethic and performance. Gray responded that he still intended to refer Smoody as one of the two apprentices.

On June 24, four journeyman and two apprentices arrived at Respondent's facility to complete their pre-hire paperwork. Wargolet telephoned LeMaster to inquire whether he had any concerns with the names of the individuals forwarded by the Union. LeMaster informed Wargolet that if he needed productive people for a quick paced job he should not hire Smoody or the journeyman named Francisco. After his telephone conversation with LeMaster, Wargolet called Smoody and Francisco into a separate area and stated that he was sending them back to the Union hall (GC Exh. 11).

[6] While LeMaster asserts that Union Steward William Vareck was present during his conversation with Smoody and also signed the memorandum, Smoody contends that Vareck was not present. Although this testimony presents a direct credibility conflict, it need not be resolved as it is not dispositive to my overall findings in this case.

B. The Section 8(a)(1), (3) and (4) Allegations

The General Counsel alleges in paragraph 8 of the complaint that on June 24, the Respondent refused to consider and/or hire Smoody because she assisted the Union and filed an unfair labor practice charge in Case 30-CA-15617.

The Respondent asserts that Smoody was not hired on June 24 because of prior issues with her productivity and job performance, and points to the fact that between the settlement of Case 30-CA-15617 in August 2002 and June 24, there was no union animus alleged by the General Counsel or established by record testimony. In the Respondent's view, this lengthy hiatus militates against the General Counsel's complaint allegations and strongly supports their position that the refusal to consider and hire Smoody, was solely based on lawful reasons unrelated to her union activities or filing charges and providing testimony under the Act.

In *Wright Line,* 251 NLRB 1083 (1980), enfd, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1993). In *Manno Electric,* 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

The Board in *FES (A Division of Thermo Power),* 331 NLRB 9 (2000), 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002), determined that the General Counsel must show in a discriminatory refusal to hire violation the following at the hearing on the merits. First, that the respondent was hiring, or had concrete plans to hire. Second, that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination. Third, that antiunion animus contributed to the decision not to hire the applicants. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. To establish a discriminatory refusal-to-consider violation, pursuant to *FES,* supra, the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.[7]

[7] To establish a discriminatory refusal to consider and hire case, the General Counsel is required to prove the allocation of burdens set forth in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

There is no dispute that the Respondent was hiring in June 2004, as it made offers of employment to three individuals for journeyman electrician positions and one individual for an apprentice position.

The Respondent strongly argues that the General Counsel has not established a prima facie case in accordance with the *Wright Line* guidelines. In this regard, they point to the absence of any union animus between the settlement of Case 30-CA-15617 in August 2002 and the underpinnings of the subject charge that occurred on June 24.

While I concur that the General Counsel did not establish any independent discriminatory conduct during this approximately two year period, I am convinced that the actions of the Respondent in 2001 were substantial and support the threshold for the establishment of a prima facie case by the General Counsel. For example, while not making an independent finding under the Act, I am of the opinion that Hetland engaged in violative conduct when he threatened Smoody in June 2001 about contacting the Union Business Manager, and then engaged in a retaliatory layoff on the same day. Pursuant to those actions, grievances and unfair labor practices were filed against the Respondent and a Notice to Employees was posted in the Respondent's facility for a period of 60 days. Additionally, in June 2001, Respondent's Part Owner Arthur Maurer stopped payment on a check that had previously been given to Smoody because a grievance had been filed. In August 2001, the labor-management committee granted the relief requested by the Union's grievance for damages and full reimbursement regarding the check.

In my view, even if no discriminatory conduct occurred during the two year period, the stigma of the numerous grievances and the unfair labor practice complaint coupled with the involvement and personal intervention of Respondent's Part Owner convinces me that sufficient evidence has been presented by the General Counsel to establish a prima facie case.

In defending its decision not to hire Smoody, the Respondent argues that she did not possess the specific qualifications that the position required. In this regard, the Respondent argues that the job for which they sought referrals from the Union was a significant undertaking that needed productive workers who were self starters and independently motivated. Based on their prior experience with Smoody, who worked at a slower pace then most apprentices who had completed 90% of the Apprentice Training Program, it was determined that she was not qualified for one of the two available apprentice positions. LeMasters credibly testified that Smoody was not skilled in "bending pipe" and it was necessary to reassign her to less demanding duties on the composite clean-up crew before removing her from that assignment due to complaints received from the General Contractor. Moreover, despite the General Counsel's efforts to infer union animus to LeMasters and Wargolet, the record evidence shows that neither of these individuals were aware of Smoody's prior involvement in union activities nor did they know that the General Counsel had issued a complaint regarding Smoody's retaliatory layoff. See, *Tomatek, Inc.,* 333 NLRB 1350 (2001). Additionally, LeMasters credibly testified that he never saw the Notice to Employees that was posted in Respondent's facility that addressed the layoff issue. Likewise, I note that Smoody admitted that LeMasters counseled her on a number of occasions regarding her work performance and her inappropriate actions in excessive socializing with employees. It is further noted that Wargolet credibly testified that he did not know Smoody prior to meeting her on June 24, a fact admitted by Smoody. Finally, the record establishes that Wargolet telephoned Gray on June 23, and informed him that the Respondent had concerns about Smoody's productivity based on her prior job performance and requested that another apprentice be referred. Gray did not rebut this testimony.

For all of the above reasons, I find that the Respondent did not hire Smoody on June 24, for legitimate reasons unrelated to her union activities or the filing of charges and giving testimony under the Act. Thus, I find that the Respondent would have taken the same action even in the absence of her union support or activity. Lastly, I find that Smoody was not excluded from the hiring process as her qualifications and experience were fully considered by the Respondent. Rather, Smoody was not considered for the apprentice position based on her previous job performance, a lawful reason unrelated to her protected conduct and the filing of charges or giving testimony under the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent did not violate Section 8(a)(1) (3) and (4) of the Act when it refused to consider for employment and/or hire Ember M. Smoody because of her union activities, filing charges and giving testimony under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 2, 2005

Bruce D. Rosenstein
Administrative Law Judge

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.